BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICKY D. WIEHE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,018,499
TONY SCHUETZ CONSTRUCTION	)	
Respondent	)	
AND	)	
	)	
WESTERN AGRICULTURAL	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 14, 2004 preliminary hearing Order of Administrative Law Judge Steven J. Howard. Claimant was awarded benefits in the form of medical treatment and temporary total disability compensation after the Administrative Law Judge (ALJ) determined that claimant suffered accidental injury arising out of and in the course of his employment on the date alleged.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged? Respondent argues claimant's injury occurred as a result of a personal condition and, therefore, is not compensable under the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be reversed.

Claimant worked for respondent for 12 years as a heavy equipment operator. Several years prior to the date of accident, claimant was provided with a key and a security code granting him access to respondent's shop and surrounding property. Claimant was generally scheduled to start work at 7:00 in the morning and would normally clock in at that

time. However, claimant had developed a habit of going to work early, between 6:15 a.m. and 6:30 a.m., opening up the facility and preparing and organizing for the day's work. Respondent's owner, Tony Schuetz, was aware of claimant's activities in this regard.

On August 12, 2004, claimant arrived at the shop, opening the facility gate and disarming the security code. He then parked his truck and went into the shop, where he found his lunch box from the day before. He returned the lunch box to his truck and turned to return to the shop. Between the truck and the shop, claimant testified that his knee popped twice and then went out, and claimant fell to the ground. He contacted Tony Schuetz, the owner, who came to the shop location and drove claimant to his mother's house. Claimant's mother then took him to the emergency room. Claimant came under the treatment of George G. Robinson, II, M.D., a surgeon, who performed surgery on claimant's knee on August 27, 2004, to repair partial tears in claimant's medial and lateral menisci. Claimant acknowledged during cross-examination, that he did not trip or fall before this injury. He also acknowledged that he had had no prior knee problems that he was aware of. Claimant turned in the medical expenses claims to his health insurance carrier, Blue Cross, and later filed a workers compensation claim for the injury.

The ALJ granted benefits to claimant, apparently determining that the situation was one which arose out of and in the course of claimant's employment.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

For a claim to be compensable, a claimant must establish personal injury by accident arising out of and in the course of his employment.[2] For a claim to arise "out of" employment, its cause or origin must develop out of the nature, conditions, obligations and incidents of employment."[3]

The intent of this definition is to permit recovery only for those injuries which result from a hazard to which the employee would not have been equally exposed except for the employment.[4]

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[1] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[2] K.S.A. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

[4] *Craig v. Electrolux Corporation,* 212 Kan. 75, 510 P.2d 138 (1973).

It is not always necessary for an injury to be caused by trauma or by some form of physical force before it can be found compensable.[5] However, when an injury is attributable to a personal condition of the employee and no other factors contribute to the injury, the injury is not compensable.[6]

In 1998, the Kansas legislature amended K.S.A. 44-508(e) to provide,

> An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[7]

In this instance, the facts and circumstances surrounding claimant's fall do not remove it from the normal activities of day-to-day living. Claimant did not slip or trip on anything in respondent's parking lot, nor was there anything about his daily work activities that led him to fall on August 12, 2004. While K.S.A. 2003 Supp. 44-508(e) does not exclude "accidents" but rather excludes injuries where the "disability" is the result of the natural aging process or the normal activities of day-to-day living,[8] simply sustaining a fall in respondent's parking lot and injuring his knee does not entitle claimant to benefits. The Board has dealt with this issue in prior cases. In *McDowell*,[9] the claimant, a corrections officer, suffered an injury while he was walking in the gymnasium from one side of the gym to the other. There was a loud snap in the claimant's left ankle and the claimant suffered a significant injury. The claimant acknowledged he did not stumble or twist his ankle prior to the fall, but was "plainly walking from one side to the other." The Board found that the claimant in *McDowell* did not prove that he suffered accidental injury arising out of and in the course of his employment, but that instead this was a personal condition which arose from "the normal activities of day-to-day living."

Likewise, in *Panter*,[10] the claimant was walking in respondent's parking lot when she stepped to the left and while turning left, her right knee gave out. The Board again

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[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[6] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[7] K.S.A. 44-508(e) (Furse 1993).

[8] *Corbett v. Schwan's Sales Enterprises*, No. 216,787, 1998 WL 204287 (Kan. WCAB May 26, 1998).

[9] *McDowell v. State of Kansas*, No. 1,012,504, 2003 WL 23172915 (Kan. WCAB Dec. 3, 2003).

[10] *Panter v. Westar Energy, Inc.*, No. 1,013,059, 2003 WL 23172914 (Kan. WCAB Dec. 31, 2003).

considered this to be a non-compensable event as it was a personal injury which resulted from "the normal activities of day-to-day living."[11]

In this instance, the factual situation leading up to claimant's injury is eerily similar to that in *Panter* and somewhat similar to that in *McDowell* in that here, claimant neither tripped nor fell nor suffered any type of traumatic incident prior to the snapping in his knee, which caused him to fall to the ground.

The Board finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment, but rather that he suffered an injury which arose out of the normal activities of day-to-day living and is, therefore, not compensable.

The Board, therefore, reverses the preliminary hearing Order of Administrative Law Judge Steven J. Howard dated October 14, 2004, and denies claimant benefits in the above matter.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated October 14, 2004, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] K.S.A. 2003 Supp. 44-508(e).